

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

PHL VARIABLE
INSURANCE COMPANY,

Plaintiff,

v.

C.A. _____

WERTHER FAMILY INSURANCE
TRUST 2006, and its trustee,
NATCITY TRUST COMPANY OF
DELAWARE,

Defendants.

**PLAINTIFF'S COMPLAINT
FOR DECLARATORY JUDGMENT**

PHL Variable Insurance Company ("Phoenix"), by and through its attorney, files this Complaint against the Werther Family Insurance Trust 2006 (the "Trust") and its trustee, NatCity Trust Company of Delaware (the "Trustee"), as follows:

THE PARTIES

1. PHL Variable Insurance Company is a Connecticut insurance company authorized to transact the business of insurance in Delaware. Phoenix is a citizen of Connecticut within the meaning and intent of 28 U.S.C. § 1332.
2. The Trust is a statutory trust organized under the laws of Delaware and is a citizen of Delaware within the meaning and intent of 28 U.S.C. § 1332. The Trust may be served through its trustee, NatCity Trust Company of Delaware, 1201 North Market Street, Wilmington, Delaware 19801.
3. The Trustee is a corporation organized under the laws of Delaware and is a

citizen of Delaware within the meaning and intent of 28 U.S.C. § 1332. The Trustee may be served through its registered agent, NatCity Trust Company of Delaware, 1201 North Market Street, Wilmington, Delaware 19801.

JURISDICTION AND VENUE

4. This suit presents a case of actual controversy within the diversity jurisdiction of this Court.

5. Phoenix is a citizen of the State of Connecticut.

6. The Trust is a citizen of the State of Delaware and is subject to the jurisdiction of the Court. The Trustee is a citizen of the State of Delaware and is subject to the jurisdiction of the Court.

7. This Court has diversity jurisdiction of this action, as Phoenix, on the one hand, and the Trust and Trustee, on the other hand, are citizens of different states and, as set out more fully below, the amount in controversy exceeds \$75,000, exclusive of interest, attorneys' fees, and costs. Therefore, this Court has jurisdiction by virtue of 28 U.S.C. § 1332.

8. This Court has jurisdiction for the declaratory judgment action pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201 and 2202, which grant the United States District Courts jurisdiction to declare the "rights and other legal relations of any interested party making such declaration, whether or not further relief is or could be sought."

9. Venue is proper for this action, since the Trust and Trustee are citizens of Delaware, and the insurance policy at issue is governed by Delaware law.

FACTUAL BACKGROUND

10. Phoenix is, and during all relevant times has been, in the business of underwriting and issuing policies of life insurance and is authorized to transact the business of insurance in the State of Delaware.

11. As described more fully in the ensuing paragraphs, Phoenix received a written application for an insurance policy insuring the life of Bernard Werther ("Mr. Werther"). In completing this application, Mr. Werther and Defendants provided Phoenix material information regarding, among other things, Mr. Werther's background, income and net worth. Mr. Werther and the Defendants knew that they were required to provide complete, accurate and honest answers to the questions presented on the application. Mr. Werther and the Defendants also knew that Phoenix would rely upon the answers recorded on the application in determining whether Mr. Werther was insurable and qualified for the insurance sought through the Application.

12. The Trust, by and through its trustee, NatCity Trust Company of Delaware, applied in writing to Phoenix seeking the issuance of an insurance policy, insuring the life of Mr. Werther (the "Application"). As a result of the Application and in reliance on the information provided therein, Phoenix issued life insurance policy number 97518232 (the "Policy") to the Trust, with an effective date of August 9, 2006. The Policy's death benefit exceeds \$75,000.

13. In completing the Application, Mr. Werther and the Trust, through its Trustee, responded to clear, direct questions seeking material information regarding Mr. Werther's background, income and net worth. The Application represented that Mr. Werther resided at 120 E. Golf Drive, Hollywood, Florida

33021, that he had never been convicted of a felony, and that he had a net worth of \$38,000,000. Mr. Werther claimed that a "large portion [of his net worth was] in cash and other marketable securities and then personal/commercial real estate making up bulk of remainder."

14. The Application contained the following affirmation:

I have reviewed this application, and the statements made herein are those of the proposed insured and all such statements made by the proposed insured in Part I or and in Part II of this application are full, complete, and true to the best knowledge and belief of the undersigned and have been correctly recorded.

Mr. Werther executed the Application on May 5, 2006 and the Trust, through its Trustee, executed the Application on July 20, 2006.

15. As noted above, the Application requested material information regarding, among other things, Mr. Werther's background, income and net worth. Mr. Werther provided responses to each of these queries. The responses were materially incorrect and/or fraudulent. Specifically, at the time of application or policy issuance, Mr. Werther did not have a net worth of \$38 million, especially one primarily comprised of cash, marketable securities, and real estate. Mr. Werther also provided incorrect answers to such basic questions as his address and criminal history.

16. On the basis of the statements and representations on the Application and in reliance upon Mr. Werther's and the Defendants' complete candor, honesty and openness in disclosing information in response to the questions presented on the Application, Phoenix approved the issuance of the Policy. As noted, however, the statements made during the application process with respect to Mr. Werther's background and net worth were materially incorrect or fraudulent. Mr. Werther

and Defendants knew or had reason to know of the falsity of these representations. The misrepresentations were each material to the risk Phoenix assumed. Had Mr. Werther and the Defendants been truthful when completing the Application, Phoenix would not have issued the Policy or would have done so on materially different terms. As a result of the Policy's issuance, Phoenix paid commissions to its sales representatives that it would not have paid, but for the sale.

17. Phoenix brings this action seeking rescission of the Policy and an order declaring the Policy void *ab initio*.

DECLARATORY JUDGMENT

18. Phoenix incorporates herein by reference each of its allegations contained in Paragraphs 1–17 above.

19. Pursuant to the federal Declaratory Judgment Statute, 28 U.S.C. § 2201, Phoenix seeks a declaratory judgment that the Policy is null, void and rescinded *ab initio* due to the fraudulent and/or material misrepresentations and omissions that Mr. Werther and Defendants made on the Application, and that as a result of said rescission, Phoenix may deposit with the Clerk of the Court all premiums paid on the Policy along with required interest, if any. Phoenix also seeks its fees pursuant to the Declaratory Judgment Statute.

RELIEF REQUESTED

WHEREFORE, due to the above-referenced fraudulent and/or material misrepresentations, Phoenix demands judgment against the Trust and Trustee and 2007 Trust and Trustee, as follows:

- (a) an order declaring and adjudging the Policy of life insurance bearing

Policy Number 97518232 to be null and void and rescinded, *ab initio*;

(b) an order that Phoenix deposit with the Clerk of the Court all premiums paid on the Policy along with required interest, if any; and

(c) an order that the Clerk of the Court pay to Phoenix from the premiums deposited an amount equal to the commissions paid by Phoenix to the agents or sale representatives arising out of or relating to the sale of the Policy; and

(d) an order awarding cost of suit and reasonable attorneys' fees pursuant to the Federal Declaratory Judgment Statute and such other relief as the Court deems equitable and just to Phoenix.

ASHBY & GEDDES



Richard D. Heins (I.D. #3000)
Tiffany Geyer Lydon (I.D. #3950)
500 Delaware Avenue, 8th Floor
Wilmington, DE 19899
(302) 654-1888
rheins@ashyb-geddes.com
tlydon@ashby-geddes.com

Attorneys for Plaintiff
PHL Variable Insurance Company

Of Counsel:

David T. McDowell
Thomas F.A. Hetherington
Jarrett E. Ganer
BRACEWELL & GIULIANI LLP
South Tower Pennzoil Place
711 Louisiana, Suite 2300
Houston, Texas 77002
(713) 223-2300

Dated: August 5, 2008

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

PHL VARIABLE INSURANCE COMPANY

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Tiffany Geyer Lydon, Ashby & Geddes, 500 Delaware Avenue,
P.O. Box 1150, Wilmington, DE 19899 (302) 654-1888

DEFENDANTS

WERTHER FAMILY INSURANCE TRUST 2006,
and its trustee, NATCITY TRUST COMPANY OF DELAWARE

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|---------------------------------------|---------------------------------------|---|----------------------------|---------------------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State | <input checked="" type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER/STATUTES
<input checked="" type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
				<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify) _____
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. Section 1332, 28 U.S.C. Sections 2201, 2202

Brief description of cause: Action to declare life insurance policies null and void and rescinded, ab initio due to fraudulent and/or material misrepresentations.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

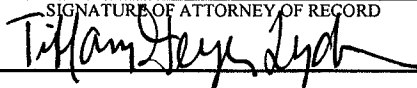
JUDGE

DOCKET NUMBER

DATE

August 5, 2008

SIGNATURE OF ATTORNEY OF RECORD



FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

AO FORM 85 RECEIPT (REV. 9/04)

United States District Court for the District of Delaware

Civil Action No. 5

ACKNOWLEDGMENT
OF RECEIPT FOR AO FORM 85

NOTICE OF AVAILABILITY OF A
UNITED STATES MAGISTRATE JUDGE
TO EXERCISE JURISDICTION

I HEREBY ACKNOWLEDGE RECEIPT OF 2 COPIES OF AO FORM 85.

8/5/08

(Date forms issued)

Patrick Boyer

(Signature of Party or their Representative)

Patrick Boyer

(Printed name of Party or their Representative)

Note: Completed receipt will be filed in the Civil Action